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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

No. 71-1192

DONALD GOLDSTEIN, RUTH KOVEN
and DONALD KOVEN,
Petitioners,

v.

STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT
OF THE SUPERIOR COURT OF COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE FOR Custom Recording Company, Inc.; Eastern Tape Corporation; K-N Enterprises, Inc.; and Omega Sales, Inc.

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For Custom Recording Company, Inc.;
Eastern Tape Corporation;
K-N Enterprises, Inc.;
and Omega Sales, Inc.

Amici include the following companies:, Custom Recording Company., in North Augusta, South Carolina; Eastern Tape Corporation in Charlotte, North Carolina; K-N Enterprises, Inc., in Shreveport, Louisiana; and Omega Sales, Inc., in Atlanta, Georgia. Amici hereby move, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief amici curiae in the

above-entitled case. Consent to the filing of the brief has been sought from petitioners and from respondent, and petitioners have consented to the filing.[1] Respondents have refused to consent to the filing.

All amici are relatively small companies engaged in the manufacture and/or sale of eight-track stereo tape cartridges on which are embodied a number of musical performances. These musical performances are electronically copied by amici onto their tape cartridges directly from uncopyrighted sound recordings, usually phonograph albums, which were originally produced by manufacturers other than amici and which were purchased by amici on the open market. Amici seldom if ever copy all of the musical performances from any one phonograph album, preferring rather to combine on one tape cartridge musical performances selected from a plurality of phonograph albums so as to offer to the public a unique program selection of currently popular musical performances by several different artists.

Amici have all been in business for a relatively short time (ranging from several months to approximately two years), and they have endeavored to operate legitimately under all state and federal laws. Amici sell their products under their own distinctive labels, which include thereon amici's names and addresses as manufacturer, and amici submit statutory notices and royalty payments to the copyright proprietors of the underlying musical compositions used on amici's tape cartridges as required by the compulsory licensing provisions of the federal Copyright Act.[2]

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[1]The written consent of petitioners has been filed with the Clerk.

[2]17 U.S.C. §1(e).

Amici are aware that the rerecording industry, like most others, includes a misguided few who operate clandestinely and contrary to valid federal and state laws and whose legal position is unsound apart from the question of whether uncopyrighted sound recordings can be validly protected under state law. However, amici, firm in the opinion that published and uncopyrighted sound recordings are in the public domain and therefore legally subject to copying, have operated openly and legitimately, as indicated above, in providing new and distinct products of high quality to the public in response to a significant public demand that would otherwise go unsatisfied.

Because amici have openly challenged the position of the major recording companies to the effect that, as original manufacturers of uncopyrighted sound recordings, they automatically acquire absolute and perpetual monopoly rights in such sound recordings under state law, amici's entire business operations are constantly threatened with extinction under a barrage of harassment and litigation pursued on a huge scale in a concentrated effort to drive amici from the market place and thereby eliminate the open competition which amici offer to the consuming public.

Accordingly, amici's attached brief attempts to set out some of the practical aspects surrounding the legal questions presented in this case, which amici have learned from their experiences in the market place, and amici earnestly submit that these views of amici should be considered by this Court in deciding questions which so vitally affect amici's very existence.

Amici therefore respectfully request that the Court grant amici leave to file the attached brief amici curiae.

Respectfully submitted,

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BRIEF AMICI CURIAE
For Custom Recording Company, Inc.;
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I. INTEREST OF AMICI

Amici, as is more fully set forth in the Motion for Leave to File a Brief Amici Curiae, are separate corporations engaged in the manufacture and sale of eight-track cartridges similar to those sold by petitioners, such sale resulting in the conviction of petitioners under the

California criminal statute[1] being challenged here. All four amici attempt to sell their tape cartridges throughout many of the states in the United States and, as will become more apparent below, the legality of the products manufactured and sold by amici have been challenged directly in lawsuits brought against some amici under state law and indirectly by the presence of state criminal laws similar to the California statute presently before this Court.

Accordingly, the business interest of amici, and the personal interest of their officers and employees, are vitally affected by a decision of this Court relating to the constitutional validity of state laws declaring the products of the type manufactured and sold by amici to be illegal and therefore subject to criminal and/or civil sanctions.

II. STATEMENT

Amici purchase on the open market a substantial number of phonographic recordings which have been originally manufactured by other companies, and which are not entitled to protection under the federal Copyright Act because they were originally fixed or published prior to February 15, 1972.[2] Amici have transferred some of the musical performances embodied on these phonographic records to magnetic tapes which amici sell under their own distinctive label to the general public. Usually, each tape cartridge manufactured and sold by amici includes approximately fourteen to twenty different

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[1] California Penal Code, Sec. 653(h).

[2] Public Law 92-140, Section 3, amending the Federal Copyright Act, Title 17, U.S.C.

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law setting out the common law regarding such products. Because there is no uniformity of state law, amici, in addition to continually monitoring the legislative enactments of fifty different states, can proceed to offer their products in most states only on the pain of having state law ultimately declare that amici have acted contrary to the previous undecided law of unfair competition in that state, whereupon amici are subject to injunctions and monetary damages in addition to the loss of any investment required to commence business operations in that state. More significantly, perhaps, from a practical standpoint, amici must risk the burden of defending a number of different lawsuits in each such state, and it is believed apparent that the litigation expenses, compounded over a significant number of states, offer an intolerable financial burden, even if amici are successful in defending these lawsuits.

This litigation burden is neither illusory nor speculative. One amici, Eastern Tape Corporation, who has been in business for approximately two years, is presently having to defend eight different lawsuits in three states.[11] And another amici, Custom Recording Com-

[11]In the Superior Court of Charlotte, North Carolina, Eastern Tape Corporation is defending four unfair competition suits brought, respectively, by Liberty/United Artists, Inc. (70 CVS 15108), MCA, Inc. (71 CVS 2579, CBS, Inc. (71 CVS 4602), and Capitol Records, Inc. (71 CVS 15105); and three diversity suits asserting unfair competition under Illinois state law brought, respectively, by CBS, Inc. (72-C-341), Capitol Records, Inc. (72-C-340), and Atlantic Recording Corp. (72-C-1709), all in the U.S. District Court, N.D. Ill., Eastern Div.; and one diversity suit asserting unfair competition under Georgia state law brought by Gate City Record Service Co. et al (Civ. Act. No. 16500, N.D. Ga., Atlanta Div.). Eastern Tape Corporation and Custom Recording Company have been in business for approximately two years, and the remaining amici have been in business for less than one full year.

pany, is defending two lawsuits in two states,[12] all of these lawsuits relating directly to the question of whether the duplication of uncopyrighted sound recordings constitutes unfair competition under the common laws of the several different states involved.

These lawsuits have been brought against amici by some of the largest corporations in the country, including CBS, Inc., and Capitol Records, Inc., and it is obvious that relatively small re-recorders such as amici cannot hope to match the music industry giants in budgetary commitments for litigation purposes. The scope of the problem facing amici is illustrated by an article appearing at page 3 in the November 6, 1971, issue of *Billboard* magazine which indicates that the music industry has combined to amass a budget of $350,000 which has already been spent in attempting to stop companies such as amici from manufacturing or selling duplicated sound recordings, and has plans to commit over $1,000,000 in 1972 for the same purpose, with a "large percentage of the budget [going] towards a proposed war chest." All of this is presumably in addition to the individual "war chest" of the major recording companies. More recently, an article appearing at page 3 of the July 22, 1972, issue of *Billboard* magazine quotes the president of the major national recording industry association (RIAA) to the effect that such civil suits have been brought in 40 states against approximately 500 defendants.

Keeping in mind that the fifty states present fifty potential litigation battlegrounds, it is quickly apparent

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[12] *CBS, Inc. v. Custom Recording Co., et al.*, Court of Common Pleas, County of Aiken, State of South Carolina; and *Gate City Record Service Co. et al. v. Custom Recording Co., et al.*, (Civ. Act. No. 16500, N.D. Ga., Atlanta Div.).

that the tremendous economic inferiority of re-recorders such as amici puts them in the position of fighting a war of attrition that they cannot hope to win even though their legal position is sound. Amici have continued to defend the lawsuits brought against them in the belief that this Court's decisions in the *Sears* and *Compo* cases[13] substantiate their legal position, and in the hope that this Court would ultimately vindicate this belief by overturning contrary state court decisions and establishing a uniform federal law regarding the duplication of uncopyrighted sound recordings. But, in the absence of this relief, amici cannot withstand the ligitation burden which is now, and will undoubtedly continue to be, imposed on them by the large recording companies. Also, aside from the direct effect which this litigation burden has on those re-recorders presently defending lawsuits, the mere prospect of having to face such extensive litigation will discourage others who may otherwise wish to enter the field.

It is therefore earnestly submitted that the original manufacturers of uncopyrighted sound recordings are exercising unlawful monopoly rights in these sound recordings and, as a result, higher profits can be, and are, extracted from the public because of the absence of direct competition. A portion of these profits is then allocated to "war chests" designed to eliminate any challenge to such monopoly rights by sweeping the smaller challengers from the market place under an avalanche of litigation. The end result is the self-perpetuation of monopoly power that is absolute and totally devoid of any ultimate benefit to the public.

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[13] *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compo v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

This situation cries out for correction and vividly demonstrates the wisdom of the drafters of the Constitution and Judge Learned Hand in demanding that if product monopolies are to exist, then they must exist only for a limited time and under a uniform system of federal law designed to promote the public, rather than private, interest, and to protect this public interest against abuses inherently associated with improperly regulated monopoly power.

B. IF STATE LAWS ARE ALLOWED TO PROHIBIT THE COPYING OF FEDERALLY UNPROTECTED SOUND RECORDINGS, CONGRESS WILL BE UNABLE TO COMPARE PUBLIC INTEREST CONSIDERATIONS AND PRACTICAL MARKET CONDITIONS EXISTING IN CONNECTION WITH COPYRIGHTED AND UNCOPYRIGHTED SOUND RECORDINGS.

It is to be noted also that the problem of whether sound recordings should be the subject of a federal monopoly under the federal Copyright Act is not new. Between 1906 and 1951, no less than thirty-one bills providing protection for sound recordings were introduced in Congress (Staff of Subcomm. on Patents, Trademarks and Copyrights, Senate Comm. on the Judiciary, 86th Cong., 2nd Sess., *The Unauthorized Duplication of Sound Recordings*, U.S. Senate Study No. 26 by B. Ringer, pp. 21-37), and several additional bills were introduced after 1951. Yet, it was not until the 1971 Amendment[14] of the Copyright Act was enacted that Congress finally determined that the public interest would be served by granting copyright protection to sound recordings, and even this enactment is substantially qualified.

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[14] Public Law 92-140.

Thus, instead of permanently including sound recordings within the subject matter protectable under the federal Copyright Act, the 1971 Amendment grants copyright protection only to sound recordings produced after the effective date (February 15, 1972) of the Amendment and before December 31, 1974.[15] This unprecedented limitation is explained in House Report No. 92-487[16] where it is stated that "the purpose of the amendment is to provide a period for further consideration of various alternatives for solving the problems in this area, before resorting to permanent legislative enactment."

In this same Report, the Committee took the position that "the case for a compulsory license has not been established" and that "it would be wholly impractical in this legislation, to set up the complicated procedural machinery that would be required for the fair administration of a compulsory license even if it were found to have some advantage from the viewpoint of the public."[17] The Committee therefore concluded that "the entire question of compulsory licensing can be reexamined by the Committee when it again considers legislation for general revision of the copyright law."[18]

It seems implicit from this legislative history that Congress felt the need for legislation providing immediate interim protection for sound recordings under the federal copyright law, but the entire complicated question of

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[15] Id., Sec. 3.

[16] *U.S. Code Congressional and Administrative News*, 92 Cong., 1st Sess. 1971 (Vol. 2), p. 1567.

[17] Id., p. 1569.

[18] Id., p. 1570.

compulsory licensing of sound recordings was expressly reserved for detailed consideration by Congress prior to enacting permanent protection for sound recordings. It is significant in this regard that some of the amici appeared at the hearings held by the House of Representatives Committee on the Judiciary, Subcommittee No. 3, which was considering the 1971 Amendment, and that a formal statement was presented on behalf of such amici setting out in detail the advantages to be derived by the public if a compulsory licensing provision were included in the 1971 Amendment.[19]

It was the purpose of this statement to apprise Congress of the fact that these amici were offering to the public a new and distinct product not otherwise available on the market; namely, the so-called "mixed-hit" recording which includes on one tape cartridge a number of currently popular performances by different artists taken from phonographic albums of a plurality of original record manufacturers. The conventional practice of the major record manufacturers is to produce an album which contains approximately ten to twelve performances by one artist, only one or two of such performances having sufficient public demand to be released in single record form by such manufacturers. By substantial contrast, all of the performances included on a mixed hit recording are popular, and the public thereby has the opportunity to obtain a number of performances by different artists on one recording, all of such performances having current popularity. Amici argued that if the original manufacturers received reasonable compensation

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[19] Hearings on S. 646 and H.R. 6927, House of Rep. Committee on the Judiciary, Subcommittee No. 3, 92 Cong., 1 Sess. (1971), at 81 and 83.

under a compulsory license, then they would obtain a commensurate return on their original investment in producing a particular sound recording, and the public would have access to an infinite variety of performance selections on one album rather than being required to accept the one program content on an album offered by the original recording company.

It is believed clear, as indicated above, that Congress intends to give further consideration to the idea of providing a compulsory license for copyrighted sound recordings as a device for more fully protecting the public interest. To properly assess the entire situation and determine what effect the 1971 Amendment has had on the public, Congress will undoubtedly wish to consider market conditions surrounding federally unprotected sound recordings produced prior to February 15, 1972, as compared with market conditions existing for sound recordings that can be monpolized under the 1971 Amendment. Quite obviously, if state laws can provide state monopoly protection for those sound recordings left in the public domain under the federal Copyright Act, then Congress would have no valid basis for such a comparative study and the ability of Congress to act wisely in the field of copyrights would be substantially diminished. Moreover, if amici and all others like them can be struck from the market by state laws, there will be no one left to present to Congress, when it reconsiders the entire question of copyright protection for sound recordings, the practical advantages which may be obtained for the public from a compulsory licensing provision and, conceivably, copyright legislation devoid of such a provision could be enacted substantially by default.

As has been pointed out, monopolies are not favored in this country, and Congress, in granting the monopoly exception permitted under the federal patent and copyright laws, must carefully weigh the evils sought to be remedied by granting monopoly power against the evils that may be precipitated by the grant.[20] Since the Constitution places the power of granting copyrights solely in Congress, it would be manifestly unwise and improper if the states could deprive Congress of an opportunity to compare actual market conditions prevailing both with and without the existence of copyright protection, and thereby frustrate Congressional efforts to arrive at the best mode of protecting the public interest through its Constitutional mandate "to promote the progress of science and useful arts."[21]

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[20] See the dissenting opinion of Mr. Justice Brandeis in *International News Service v. Associated Press*, 248 U.S. 215, 264-65 (1918); Cf., Kaplan, *Performer's Right and Copyright: The Capitol Records Case*, 69 *Harv. L. R.* 409 (1956). Recently, Professor Breyer of the Harvard Law School has presented a detailed analysis of conflicting considerations which Congress must analyze in deciding upon the merits of the Copyright Revision Bill, S. 543, 91st Cong., 1st Sess. (1969). He concludes first that copyright protection has drawbacks and should therefore not be taken for granted, and that these "drawbacks should be more thoroughly understood before Congress votes on a bill that would significantly extended its boundaries." Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 238 (1970).

[21] U.S. Constitution, Art. I, Sec. 8, Cl. 8.

IV. CONCLUSION

Upon all of the foregoing amici respectfully urge this Court to declare unconstitutional the California statute being challenged here, and to reaffirm the holding of this Court in *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964) that "when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article."

Respectfully submitted,

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